No. 13509.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT J. CYR, WARREN H. PILLSBURY, Deputy Commissioners, United States Department of Labor, Bureau of Employees' Compensation, Thirteenth Compensation District, and WILLIAM LASCHE,

Appellants,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY and PACIFIC EMPLOYERS INSURANCE COMPANY,

Appellees.

Appeal From the United States District Court for the Southern District of California, Southern Division.

REPLY BRIEF FOR APPELLANTS CYR AND PILLSBURY.

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TABLE OF AUTHORITIES CITED

STATUTES

TEXTBOOKS

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It is believed that appellants' opening brief covers essentially the matters discussed in appellees' brief except in the following points, which we desire to discuss briefly.

(1) Appellees quote (p. 2) from 58 American Jurisprudence, Workmen's Compensation, Section 200, page 709, as authority for the proposition that with respect to negligence as a contributing cause there is a distinction between the original injury and a second or consequential injury, the contention being that as to the original injury,

negligence of the employee is immaterial, but contributory negligence is a factor as to the second or consequential injury. It is to be noted however that the broad assertion in the quoted text is supported by *one* citation—and upon reading the cited case (*Kruchowski v. Swift,* 201 Minn. 557, 277 N. W. 15), it appears that it does not pertain to a second injury at all but to the refusal of the employee to accept medical treatment. Moreover it is to be noted that the same textbook states that the determination as to whether the second occurrence is causally related to the original injury is "one of fact" (*Id.,* Sec. 278, p. 775.)

(2) Appellees rely upon antiquated cases decided in the years 1915 and 1918 when compensation law was in its infancy and the courts were of the impression that common law tort concepts should be applied, an impression which has since been disavowed by all courts which have given careful consideration to the question. (*Cardillo v. Liberty Mutual Ins. Co.,* 330 U. S. 469, 481; *Burns S. S. Co. v. Pillsbury* (C. A. 9, 1949), 175 F. 2d 473; *N. L. R. B. v. Hearst,* 322 U. S. 120, 124, 127, 131; *O'Leary v. Brown-Pacific-Maxon Inc.,* 340 U. S. 504.) As an indication of the character of the cases cited by appellees, one of them, *Pacific Coast Casualty Co. v. Pillsbury* (1915), 171 Cal. 319, 153 Pac. 24, states that the Compensation Act "has not even attempted to provide compensation for such collateral [consequential] injuries * * * while he was engaged in his own affairs outside of and not connected with his employment." The more modern and opposing view point is stated in the cases cited on page 5 of appellants' opening brief.

(3) We deem it unnecessary to discuss those cases cited by appellees which do not pertain to consequential injuries. Among such cases are *Penn Stevedoring Corp. v. Cardillo*

(1947), 72 Fed. Supp. 991; *Ocean S. S. Co. v. Lawson,* 68 F. 2d 55. Since appellees state (p. 10), that we have not discussed the latter case, although "the trial judge relied heavily on this case in his decision" we shall discuss it here. The cited case did not involve a "consequential injury." The employee there *was not injured again.* In that case the employee's wound became infected and the question was whether that infection "naturally or unavoidably resulted from the accidental [original] injury" a requirement for compensation for infection under Section 2(2) of the Act, 33 U. S. C. A., Section 902(2). As stated Section 2(2) of the Compensation Act provides in substance that compensation for infection following an injury is payable *only if such infection naturally or unavoidably results from such injury.* The deputy commissioner in that case made no finding as to whether the infection naturally and unavoidably resulted from the injury; for this reason the Court *remanded the case to the deputy commissioner* to make such a finding "and then to reconsider the case." In the instant case there was a *second injury* and the deputy commissioner made a finding that the second injury was "directly attributable" to the original injury. In the *Ocean S. S.* case the question of the employee's negligence was involved because the statute expressly makes it material in the case of infections. As stated an infection following an injury is only compensable if it naturally or unavoidably results from the injury; *a fortiori* an infection is not compensable if it results from the injured employee's negligence. Because Congress provided special requirements for compensability for infections following an injury, it would seem that *other* consequential disabilities from the injury follow the usual pattern of compensability, namely that all disabilities which result from the injury are compensable whether

or not they are the natural, direct, proximate, predictable, foreseeable or immediate consequences of the injury.

It is therefore apparent that the *Ocean S. S. Co.* case and the instant case are dissimilar in facts, in the posture in which they come before the reviewing court and in the legal issues involved.

(4) In appellees' second point it is stated that the reviewing court is not bound to accept the findings of the deputy commissioner. The most recent pronouncement upon this point—by the Supreme Court—may be found in *O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U. S. 504, 508. In that case the court said the findings of the deputy commissioner "are to be accepted [by the reviewing court] unless they are unsupported by substantial evidence on the record considered as a whole." This does not mean that the reviewing court should reweigh the evidence. See footnote 21 to the case of *Universal Camera Corp. v. N. L. R. B.,* 340 U. S. 474. Accord: *U. S. F. & G. Co. v. Britton* (C. A. D. C. 1951), 188 F. 2d 674; *Cf. Pittston Stevedoring Corp. v. Willard* (C. A. 2, 1951), 190 F. 2d 267.

In a case subsequent to *O'Leary v. Brown, supra,* 340 U. S. 504, the Supreme Court cited with approval in *United States v. Oregon Medical Society,* 343 U. S. 326, 339, the quotation in *United States v. U. S. Gypsum Co.,* 33 U. S. 364, 395, as follows:

> "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

We believe that it may be conservatively stated that it is not correct to say that the reviewing court is not bound to accept the findings of the deputy commissioner.

(5) In point III appellees state that appellants' brief contains no "further discussion" of the question of the doctrine of causal relationship in compensation cases. On page 6 of our opening brief we stated that such terms as "proximate cause," "direct cause" and "sole cause" were not material in compensation law and that the courts have uniformly refused to apply them, citing 10 cases, including one United States Supreme Court case and a Law Review Article which we believed supported our statement. We also cited five cases (p. 6) which we believe supported our contention that a "concurring cause" is sufficient in compensation law to establish the right to compensation. We also cited four cases (p. 7), three United States Supreme Court cases and one from this court, which we believe support our statement that common law concepts as to cause and effect have no place in the administration and application of compensation law. We also referred (p. 7) to Section 4(d) of the Compensation Law, 33 U. S. C. A., Section 904(d), where it is provided that "compensation shall be payable *irrespective of fault as a cause* for the injury."

It is difficult to imagine what further discussions of the doctrine of casualty in compensation law should be required.

(6) Appellees' brief concludes in substance, that since fault is a factor in compensation law, Section 4 of the

or not they are the natural, direct, proximate, predictable, foreseeable or immediate consequences of the injury.

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(6) Appellees' brief concludes in substance, that since fault is a factor in compensation law, Section 4 of the

Act to the contrary notwithstanding, and since the court below [not the deputy commissioner] made a finding that the employee was at fault, the order of the court below should be affirmed.

As indicated in our opening brief, if fault is a factor, the finding as to fault belongs with the deputy commissioner and not with reviewing court. (*Marshall v. Pletz,* 317 U. S. 383, 388.) This was recognized even in the case of infections where fault presumably is made a factor by express provision of the statute. See *Ocean S. S. Co. v. Lawson, supra,* 68 F. 2d 55, relied upon by appellees and the court below.

Finally, even if fault were a factor in the instant case, the finding of the deputy commissioner to the effect that the second injury was directly attributable to the first injury by implication ruled out that the employee's fault was the cause of the second injury. See concurring opinion in *Head Drilling Company v. I. A. C.,* 177 Cal. 194, 170 Pac. 157 (cited by appellees, pp. 7 and 8 of their brief), where the court said that the finding of the Commission is in effect a finding that at the time of the second accident the employee was not negligent. *Cf. Sweeting v. American Knife Company,* 123 N. E. 82, 226 N. Y. 200, where Judge Cardozo states that the findings of a deputy commissioner should not be required to have the completeness of a pleading under code practice. Accord: *Monhat v. Board of Public Education,* 48 A. 2d 20, 159 Pa. Super. 423; *Texas Employers Ins. Ass'n v. Sheppard,* 42 Fed. Supp. 669.

The above reasoning is particularly applicable where as in the instant case no issue was raised before the deputy commissioner as to the injured employee's negligence and hence there was no occasion for the deputy commissioner to make a finding with reference thereto. Issues may not be raised for the first time upon judicial review. (*Moore Dry Dock v. Pillsbury, Deputy Commissioner* (C. A. 9, 1948), 169 F. 2d 988; *Parker, Deputy Commissioner v. Motor Boat Sales, Inc.* (1941), 314 U. S. 244; *Maryland Casualty Company v. Cardillo, Deputy Commissioner, and Mary Najjum* (App. D. C., 1939), 107 F. 2d 959; *Southern Shipping Co. v. Lawson, Deputy Commissioner* (Fla., 1933), 5 Fed. Supp. 321; *Metropolitan Casualty Insurance Co. v. Hoage, Deputy Commissioner* (1937), 67 App. D. C. 54, 89 F. 2d 798; *Liberty Stevedoring Co., Inc. v. Cardillo, Deputy Commissioner* (N. Y., 1937), 18 Fed. Supp. 729; *Grain Handling Co., Inc. v. McManigal, Deputy Commissioner* (N. Y., 1938), 23 Fed. Supp. 748; *State Treasurer v. West Side Trucking Co.,* 198 App. Div. 432, affirmed 233 N. Y. 202, 135 N. E. 544; *Burmester v. DeLucia* (1934), 263 N. Y. 315, 189 N. E. 231; *Bethlehem Steel Co. v. Parker, Deputy Commissioner* (C. A. 4, 1947), 163 F. 2d 334.

Conclusion.

In view of all the above it is respectfully submitted that the finding of the deputy commissioner to the effect that the second injury to the employee's leg was directly attributable to the first injury is supported by evidence

in the record considered as a whole and should be sustained. The order of the court below setting aside the compensation order was erroneous and should be reversed.

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